

ATTACHMENT A: FINDINGS AND CONCLUSIONS

CITY OF SOUTH BEND SHORELINE MASTER PROGRAM PERIODIC REVIEW AMENDMENT

SMP Submittal accepted May 11, 2022, Ordinance No. 1575

Prepared by Department of Ecology on October 21, 2022

Introduction

The Department of Ecology (Ecology) *Findings and Conclusions* (presented herein as Attachment A), provides the factual basis for our decision on the City of South Bend's (City) Shoreline Master Program (SMP) periodic review amendment. This document is divided into three sections: **Findings of Fact** regarding the amendment history and the review process, **Conclusions of Law**, and **Decision and Effective Date** of the amendment.

Brief Description of Proposed Amendment

The City of South Bend is undergoing a statutorily required periodic review of their SMP and has submitted an amendment to Ecology for review and approval. The City opted to use the joint review process set forth in WAC 173-26-104 for this periodic review and associated amendment. As part of this process on March 11, 2022, per WAC 173-26-104(3)(b), Ecology provided the City with an initial determination of consistency with the policy of the Shoreline Management Act (SMA) and applicable rules. The City's final adopted ordinance incorporated all our recommended changes provided as part of the initial determination.

FINDINGS OF FACT

Need for amendment

South Bend comprehensively updated their master program in May 2017. Now, the proposed amendment is needed to comply with the statutory deadline for a periodic review of the SMP pursuant to RCW 90.58.080(4). The amendment will bring the SMP into compliance with requirements of the SMA, or state rules that have been added or changed since the comprehensive update, ensure the SMP remains consistent with amended comprehensive plans and regulations, and incorporate revisions deemed necessary to reflect changed circumstances, new information, or improved data.

SMP provisions to be changed by the amendment as proposed

The SMP regulates shoreline uses and activities along approximately seven (7) miles of shoreline along the Willapa River – a shoreline of statewide significance - including Potter Slough, Skidmore Slough, and their shorelands. The South Bend SMP is a standalone document containing goals, policies, and regulations, and the official shoreline map. Critical area regulations are established in the SMP at Section 1.5 that incorporates portions of the City's 2016 Critical Areas Ordinance (Chapter 14.15 SBMC) into the SMP by reference. The boundaries of the shoreline jurisdiction are established in the SMP at Section 2.1, and Shoreline Environment Designations (SEDs) are established at Sections 2.2 – 2.5, and depicted in the Appendix A, Shoreline Environment Designation Map.

The specific SMP sections proposed for amendment are summarized below:¹

Chapter 1. INTRODUCTORY PROVISIONS

- 1.4.5 – New provision for those developments that are excluded from local SMP review and permits.
- 1.5 – Updated to adopt most current Critical Areas Ordinance (CAO) by reference with ordinance number; and update the list of excluded provisions.
- 1.6 – Removed provision about federal project compliance with the Coastal Zone Management Act.
- 1.7 – New provisions to implement ORMA and the Marine Spatial Plan (MSP) requirements.

Chapter 2. Shoreline Jurisdiction & Environments

- 2.6 – New rows related to ORMA and MSP activities; Revision to Footnote #4 about new and existing nonconforming overwater residential use.

Chapter 3. General Provisions for all Environments

- 3.3.3 – New provision about certified mitigation bank credits;
- 3.4 – Rename ‘Existing Development’ as ‘Nonconforming Structures, Uses and Lots’;
- 3.4.2 – New policy about legal existing residences/appurtenances considered conforming;
- 3.4.3 – Replace the three existing regulations with more specific nonconforming structure, nonconforming use, and nonconforming lot provisions based on default language in WAC 173-27-080; and add provisions for redevelopment/expansion of legal existing residential structures/appurtenances.
- 3.6 – Add extensive new goals, policies, and regulations to implement ORMA and MSP requirements;

Chapter 4. Shoreline Uses

- 4.6.3 – New regulation to clarify that ‘timber cutting only’ activities do not need a shoreline substantial development permit or exemption;

Chapter 6. Permit Procedures and Enforcement

- 6.4.3 – Update exemptions from the shoreline substantial development permit process section to:
 - Include new fair market value dollar threshold and remove explanation of value calculation;
 - Update the residential dock dollar values and standards;
 - Update the fish and wildlife habitat/fish passage exemption and include a citation to statute;
 - Remove/relocate remedial actions, stormwater improvements (both relocated to SMP 1.4.5), and WSDOT projects to other more appropriate sections of the SMP.
- 6.5.5 – Add a new provision about WSDOT project review;
- 6.11 – Add new application review procedures for ocean uses related to ORMA and MSP;
- 6.12 – Replace/add new provisions about permit filing consistent with RCW 90.58.140 and WAC 173-27;

Chapter 8. DEFINITIONS

Updated the definitions for Development and Fair Market Value Dollar Threshold.

Added definitions for the following terms: Important, Sensitive and Unique Areas (ISUs); Marine Spatial Plan for Washington’s Pacific Coast (MSP); New Ocean Uses; Nonconforming Lot; Nonconforming Structure; Nonconforming Use; Ocean Disposal; Ocean Energy Production; Ocean Mining; Ocean Oil and Gas Use and Activities; Ocean Research; Ocean Salvage; Ocean Transportation; and Ocean Use.

Amendment History, Review Process

The City prepared a public participation program in accordance with WAC 173-26-090(3)(a) to inform, involve and encourage participation of interested persons and private entities, tribes, and applicable

¹ All references are to section numbering in the revised locally adopted SMP as submitted for Ecology review.

agencies having interests and responsibilities relating to shorelines. A consultant, hired by the City, assisted with the development of draft documents, and organized public outreach and the local adoption process. An important element of the public participation plan is the City's SMP Periodic Review project [website](#)², a project-specific page to describe the SMP periodic review and post draft documents during the process. Due to the COVID-19 pandemic, the City held public meetings in a virtual format using Zoom, including project briefings at Planning Commission and Council meetings.

The City used Ecology's periodic review checklist of legislative and rule amendments to review amendments to Chapter 90.58 RCW and department guidelines that have occurred since the SMP comprehensive update and determine if local amendments were needed to maintain compliance in accordance with WAC 173-26-090(3)(b)(i). The City used Ecology's Ocean Management SMP Checklist to review current requirements of the Ocean Resources Management Act (ORMA) and the Marine Spatial Plan for Washington's Pacific Coast (MSP) and determine if local amendments were needed to maintain compliance in accordance with WAC 173-26-360. The City also reviewed changes to the comprehensive plan and development regulations to determine if the SMP policies and regulations remain consistent with them in accordance with WAC 173-26-090(3)(b)(ii). The City considered whether to incorporate any amendments needed to reflect changed circumstances, new information or improved data in accordance with WAC 173-26-090(3)(b)(iii). The City consulted with Ecology and solicited comments throughout the review process, including opportunities to comment on draft materials from September 2021 to February 2022.

The record indicates the City completed a State Environmental Policy Act (SEPA) checklist and issued a Determination of Non-Significance (DNS) for the proposed amendments to the SMP on December 29, 2021. Notice of the DNS was published in the *Willapa Harbor Herald* on December 29, 2021. The City provided 60-day Notice of Intent to Adopt to the Department of Commerce on December 14, 2021.

The City and Ecology held a joint local/state comment period on the proposed amendments following procedures outlined in WAC 173-26-104. The comment period began on December 22, 2021 and continued through January 24, 2022. A joint public hearing before the Planning Commission took place via Zoom on January 18, 2022. No one provided verbal testimony at the joint hearing.

The City provided notice to local parties, including a statement that the hearing was intended to address the periodic review in accordance with WAC 173-26-090(3)(c)(ii). The City's record indicates notice of the public comment period and hearing was emailed to interested parties on December 15, 2021 and published on December 29, 2021 in the *Willapa Harbor Herald*.

Ecology distributed notice of the joint comment period to state interested parties on December 16, 2021. A separate notice and invitation to consult was sent to the Cowlitz Indian Tribe, Confederated Tribes of Grand Ronde, Shoalwater Bay Tribe, and Confederated Tribes and Bands of the Yakama Nation.

The City accepted public comments on the proposed SMP amendments during the 30-day joint public comment period. No comments were received during the public comment period.

² <https://www.southbend-wa.gov/?view=article&id=23:shoreline-master-program-update&catid=36>

Initial Determination of Consistency

As part of this review, the City chose to utilize the joint review process set forth in WAC 173-26-104. After the joint local-state comment period and hearing, the City submitted the proposed amendment to Ecology for initial review. Ecology is required under WAC 173-26-104(3)(b) to provide the City with an initial determination of consistency with the policy of the SMA and applicable rules.

The proposed SMP amendment was received by Ecology for initial state review on February 2, 2022 and was verified as complete on February 7, 2022. This began our review and initial determination.

It is of note that Washington Department of Fish and Wildlife (WDFW) submitted comments after the close of the Joint comment, SEPA comment, and GMA state agency comment periods. The City received the WDFW comment letter on February 15, 2022, after Ecology had accepted a complete submittal for initial determination of consistency per WAC 173-26-104. The comment letter was provided to Ecology, and we considered the WDFW comments in our Initial Determination. WDFW expressed appreciation for the new regulations put in place by this amendment and concluded that the SMP provides improved protections, but offered comments focused on the following seven (7) topic areas:

1. Recommended implementation of their most recent Riparian Ecosystems Volume 1 and Volume 2 recommendation without proposing any specific SMP changes,
2. Requests to change policy phrasing from “should” to “shall”,
3. Expansion of ocean management regulations in SMP 3.6.3 to include potential impacts to habitat and consideration individual species health and fitness as an indicator of degradation,
4. Request for allowance of public boat launches in the Urban Conservancy SED in support of public access,
5. Grating requirements consistent with WDFW, Hydraulic Project Approval rules in WAC 220-660-380,
6. Request to update habitat enhancement project provisions consistent with recent statutory changes related to project sponsors,
7. Requesting mitigation plan requirements under the MSP additional procedures section.

To better understand the WDFW comments and issues of concern, Ecology staff conferred with WDFW staff on March 2, 2022, during our initial determination review. Most of the issues were resolved through discussion and information sharing between agencies. Ecology finds that the City’s SMP properly uses the terms “should” and “shall” consistent with the definitions provided in WAC 173-26-020(34) and (37). Ecology also finds that the SMP already requires no net loss of shoreline ecological functions and critical areas protections, including mitigation plan requirements that do not need to be repeated with the ocean management or MSP sections. Ecology found that only minor additional amendments were warranted based upon the significance of this information and the existing SMP provisions.³

Ecology considered the record and concluded that the proposed amendment was consistent with the policy of the SMA and applicable guidelines, subject to and including recommended changes. A written statement of initial concurrence (our initial determination) was sent to the City on March 11, 2022, including two (2) recommended changes to improve accuracy and clarity of the amendment. The first recommended change suggested revision to SMP 1.5.1 to clarify that critical area provisions incorporated by reference become SMP provisions, whereas the proposed phrasing implied shoreline

³ WAC 173-26-090(3)(b)(iii)

critical area regulations were separate from the SMP. The second change suggested revision to Section 5.6.3, as related to proposed edits at SMP 6.4.3 fish habitat enhancement exemption. Rather than duplicate exemption language in Section 5.6.3, suggested edits replaced them with broader restoration and enhancement regulations for improved consistency with WAC 173-26-231(g) and the City's Restoration Plan. This proposed edit is also supported by related WDFW comments.

Ecology advised the City to consider the recommended changes and then proceed with local adoption of the proposed SMP amendment. The City reviewed and considered the WDFW comments and our Initial Determination prior to local adoption. The City accepted both the recommended changes identified in our initial determination and incorporated those changes into the amendment prior to local adoption.

Final Submittal

With passage of Ordinance No. 1575 on April 25, 2022, the City Council authorized staff to forward the proposed amendment to Ecology for formal review.

The City's final submittal was received by Ecology for final review on May 9, 2022, with additional materials submitted on May 10, 2022. The submittal was verified as complete May 11, 2022. This began our formal review and decision making process per WAC 173-26-120.

At the conclusion of our formal review, Ecology's Director must decide to approve the amendment as submitted, approve it with required and/or recommended changes, or deny approval.

Consistency Review

Consistency with Chapter 90.58 RCW

The proposed amendment has been reviewed for consistency with the policy of RCW 90.58.020 and the approval criteria of RCW 90.58.090(3), (4) and (5). The City has also provided evidence of its compliance with SMA procedural requirements for amending their SMP contained in RCW 90.58.090(1) and (2).

Consistency with applicable guidelines (Chapter 173-26 WAC, Parts III and IV)

The proposed amendment has been reviewed for compliance with the requirements of the applicable Shoreline Master Program Guidelines (WAC 173-26-171 through -251, and -020 definitions). This included review of an SMP Periodic Review Checklist completed by the City.

Consistency with Chapter 43.143 RCW, Chapter 43.372 RCW, and applicable guidelines (WAC 173-26-360)

The proposed amendment has been reviewed for compliance with the requirements of the Ocean Resources Management Act (ORMA), the Marine Spatial Plan (MSP), applicable SMP Guidelines. This included review of the Ocean Management SMP Checklist completed by the City.

Consistency with SEPA Requirements

The City submitted evidence of SEPA compliance in the form of a SEPA checklist and issued a determination of non-significance (DNS) for the proposed SMP amendments on December 29, 2021. The record indicates notice of the DNS was published in the *Willapa Harbor Herald* on December 29, 2021. Ecology did not comment on the DNS.

Other Studies or Analyses Supporting the SMP Amendment

Ecology also reviewed supporting documents prepared by the City in support of the SMP amendment. These documents include the public participation plan and public meeting materials.

CONCLUSIONS OF LAW

After review of the complete record submitted and all comments received, Ecology concludes that the City's proposed amendments are consistent with the policy and standards of RCW 90.58.020 and RCW 90.58.090 and the applicable SMP guidelines (WAC 173-26-171 through 251, 360, and .020 definitions).

Ecology concludes that the proposed amendments satisfy the criteria for approval of amendments found in WAC 173-26-201(1)(c). This includes the conclusion that approval of the SMP amendments will not foster uncoordinated and piecemeal development of the state's shorelines (WAC 173-26-201(2)(c)(i)) and will assure no net loss of shoreline ecological functions will result from implementation of the amended master program (WAC 173-26-201(2)(c)(iv)) and WAC 173-26-186(8)).

Ecology concludes that the City has complied with the requirements of RCW 90.58.100 regarding the SMP amendment process and contents.

Ecology concludes that the City has complied with the requirements of RCW 90.58.130 and WAC 173-26-090 and WAC 173-26-104 regarding public and agency involvement in the SMP review and amendment process, including conducting a public hearing, notice, consultation with parties of interest and solicitation of comments from tribes, government agencies and Ecology.

Ecology concludes that those SMP segments relating to shorelines of statewide significance continue to provide for the optimum implementation of Shoreline Management Act policy (RCW 90.58.090(5)).

Ecology concludes that the City has complied with requirements of Chapter 43.21C RCW, the State Environmental Policy Act.

Ecology concludes that the City SMP submittal to Ecology was complete pursuant to the requirements of WAC 173-26-090, WAC 173-26-104, and WAC 173-26-110.

Ecology concludes that we have complied with the state's procedural requirements for review and approval of shoreline master program amendments as set forth in RCW 90.58.090 and WAC 173-26-104, WAC 173-26-110, and WAC 173-26-120.

Ecology concludes that with this action the City has completed the required process for periodic review in accordance with RCW 90.58.080(4) and applicable state guidelines (WAC 173-26).

DECISION AND EFFECTIVE DATE

Based on the preceding, Ecology has determined that the City's proposed amendment is consistent with Shoreline Management Act policy, the applicable SMP guidelines and implementing rules. With this approval, Ecology affirms the City has completed the requirement for a periodic review under RCW 90.58.080(4). Ecology approval of the proposed amendments is effective 14 days from Ecology's final action approving the amendment.